

## DON HATCH RIVER EXPEDITIONS

IBLA 85-520

Decided April 15, 1986

Appeal from a decision of the Moab, Utah, District Office, Bureau of Land Management, canceling permit privileges under special use permit MD-83-0023R.

Affirmed.

### 1. Special Use Permits

A special use permit is subject to any special condition or stipulation deemed necessary for protection of public interests, including minimum use requirements. Permit privileges may be canceled if a permittee has failed to satisfy minimum use requirements set forth in the provisions of the permit.

APPEARANCES: Teresa Silcox, Esq., and Richard C. Skeen, Esq., Salt Lake City, Utah, for appellant.

### OPINION BY ADMINISTRATIVE JUDGE MULLEN

Don Hatch River Expeditions, Inc. (Hatch), appeals from a decision of the Moab, Utah, District Office, Bureau of Land Management (BLM), dated February 22, 1985, canceling permit privileges under special use permit MD-83-0023R.

By order dated April 22, 1985, the Director, Office of Hearings and Appeals, granted appellant's petition for stay of BLM's decision pending the resolution of this appeal on the merits.

A 5-year special use permit, MD-83-0023R, was issued to Hatch on March 25, 1983, for commercial river trips on the Desolation-Gray segment of the Green River. Hatch claims to have been the first commercial outfitter on this segment of the Green River and has continuously conducted group trips since 1928. In the years preceding the issuance of permit MD-83-0023R, permits were issued to Hatch on an annual basis. The passenger-day allocation granted to Hatch under permit MD-83-0023R was set at a maximum of 400 passenger days per year. <sup>1/</sup> In a notice dated January 19, 1983, BLM described

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<sup>1/</sup> Passenger day is defined in permit MD-83-0023R as one commercial passenger on the river for one calendar day, or portion thereof. Revised permit provision B.II.B.(5) (Mar. 16, 1984). See also 43 CFR 8372.0-5(h) ("User day" definition).

amendments to the operating procedures and permit stipulations beginning with the 1983 permit, including the following: "Minimum use levels have been established. See Stipulations Exhibit B, II E (6)."

Hatch did not report any river use under the permit during the 1983 operating season. By notice dated November 30, 1983, BLM informed Hatch that its river use during the 1983 season did not satisfy permit requirements. After noting the lack of use in 1983, BLM advised Hatch that the permit privileges would be subject to cancellation if the allocated use level authorized by the permit was not achieved during the 1984 season.

The record indicates Hatch made no use of its permit privileges during the 1984 season. In a letter received by BLM on November 16, 1984, Hatch advised BLM that extenuating circumstances partially contributed to its reduced use of permit privileges. Hatch also expressed an intent to fully satisfy permit conditions if the permit privileges were not canceled. <sup>2/</sup> In a notice dated December 10, 1984, BLM informed Hatch that permit privileges under MD-83-0023R were canceled for nonsubstantial use. The notice also afforded a 30-day period to respond to the determination.

In a February 22, 1985, final decision, the District Manager, BLM, notified Hatch that the permit had been canceled, stating:

You are hereby notified that my final decision is to cancel all permit privileges to run commercial river trips in the Moab District under permit MD-83-0023R held by Don Hatch River Expeditions. Cancellation covers the following river segments:

<u>River Segment</u>	<u>Passenger Day Allocation</u>
Desolation and Gray Canyons	400
Green River Daily	Unallocated

Your letter of November 21, 1984, indicated that you had, over the years, made some efforts to generate business in Desolation and Gray Canyons. However, a review of the statistics for Don Hatch River Expeditions since 1979 does not demonstrate that these efforts have led to significant utilization of the permit. Your average use over this 6 year period is about 51 passenger days and over the last 2 years there has been no use at all.

We understand that loss of a camp group or groups in 1981 may have led you to neglect the permit and that economic and high water conditions have been difficult over some of the past years.

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<sup>2/</sup> Don Hatch states in an affidavit dated September 24, 1985, that appellant "logged 202 total use days in the 1985 season under Permit MD-83-0023R" and claims that if it had been allowed by BLM, it could have increased that total "by at least 125 use days."

However, poor utilization of your permit extends back through 1979 and 1980, the two highest use years for Desolation Canyon outfitters.

In its statement of reasons, Hatch contends BLM's failure to consider Hatch's long history of river use on the Green River and adverse operating conditions encountered in recent years was arbitrary, capricious, and an abuse of discretion. Appellant also argues its recent marketing efforts should demonstrate its intent to use the permit. Hatch has requested a hearing on "the legal and factual issues raised by appellant's Statement of Reasons."

[1] Special use permits are issued under the general authority of the Secretary of the Interior to regulate the use of the public lands, pursuant to section 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1982). The issuance of a special use permit is discretionary, and the Department may accept or reject a permit application in furtherance of the objectives, responsibilities, and programs for management of the public lands involved. National Public Lands Task Force, 70 IBLA 214 (1983); Cascade Motorcycle Club, 56 IBLA 134 (1981). The exercise of Secretarial discretion to issue special use permits also includes the authority to set permit conditions. Osprey River Trips, Inc., 83 IBLA 98 (1984).

The general requirements for issuance of special use permits are set forth in 43 CFR Subpart 8372. In addition, special guidelines for river recreation use permits in Utah were established and published at 46 FR 3642 (Jan. 15, 1981). The provisions found in MD-83-0023R were established in accordance with the two above noted authorities. The permit provision at issue here, B.II.E.(b), reads as follows:

Use authorization for river segments listed below will be subject to cancellation of [sic] the average use for two consecutive years does not meet the following minimum:

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|--|---------------|
| (a) Green River, Desolation-Gray                   | 200 user days |
| (b) Green River, Nefertiti Rapid to Swasey's Rapid | 100 user days |
| (c) Colorado River, Westwater                      | 100 user days |
| (d) Colorado River, Cisco Landing to Castle Creek  | 100 user days |
| (e) San Juan                                       | 200 user days |

Special guidelines for management of river-running permits in Utah include the following instruction (I.E.4): "Allocations may be reduced for failure to make substantial use for two or more consecutive years." 46 FR at 3643. Moreover, the Department's Special Recreation Permit Policy (comments on the special use permit program) states: "Consistent non-use of user days by a

permittee may be a determining factor in future use allocations and award of permits." 49 FR 5300, 5305 (Feb. 10, 1984). A preamble explanation for the preceding comment reads: "When an area's maximum allowable use has been allocated, it is important to ensure the allocation is fully utilized. The authorized officer must determine if non-use is excusable without penalty of future adjustments." Id. at 5303.

We are unable to construe permit provision B.II.E.(6) as inconsistent with the Department's authority to regulate permit use. Appellant contends the manner in which BLM applied this provision is an abuse of discretion, but has not offered evidence to show BLM's determination was inconsistent with the governing regulations and the permit provision cited. During the 1983 and 1984 seasons, Hatch failed to make any use of the permit. By its terms, such inactivity subjected the permit to cancellation. Appellant asserts BLM should have considered mitigating factors. The record indicates various factors identified by appellant as well as other factors affecting permit use were considered by BLM in its decisionmaking process. BLM noted that Hatch and the industry outfitters, as a whole, will on occasion experience adverse weather and economic conditions, but relied on the fact that Hatch's use of its permit was not consistent with use by other outfitters on this segment of the river. The passenger days recorded for Hatch's use on the Green River (Desolation-Gray segment) in the years prior to 1983 are as follows: 1977-200, 1978-448, 1979-95, 1980-70, 1981-84, 1982-56. Moreover, Hatch is one of only two outfitters (out of 26 total) permitted for this segment of the river who failed to log over 200 passenger days in 1984. The record also includes a letter dated September 6, 1984, in which Hatch declares, "I've figured my trips and costs and conclude that it would be more expensive for me to show use in Gray-Desolation Canyons and keep my permit, than it would be for me to forfeit." Accordingly, the record supports a finding that Hatch chose not to comply with permit requirements with full knowledge that this decision might result in loss of the permit privileges, as well as BLM's ability to make the ultimate decision to cancel appellant's permit privileges. When there has been a considered decision that use on a river must be limited to protect the environment, requiring actual use of special use permits which have been issued is in the public interest. Cancellation of a permit for nonuse is proper to provide the opportunity of assigning the privileges under the permit to a party who will use them. <sup>3/</sup> Appellant has not demonstrated BLM's determination to cancel its permit privileges for the Desolation-Gray segment of the Green River was improper.

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<sup>3/</sup> Appellant has asserted a level of permit use during the 1985 season which exceeds the minimum limit. See note 2. Appellant has also expressed a desire and commitment to continue operations on this segment of the Green River and has alluded to hardships which cancellation of the permit might bring. In reassigning passenger days allotted to Hatch under MD-83-0023R, BLM has the right, but no obligation to review the possibility of a cancellation in part of the total allotment allowed under the permit consistent with the historic use of the river by Hatch. Cancellation in part (reduction) of the passenger day allotment under permit provision B.II.E.(b) would be consistent with the special guidelines and policy statements for river use permits. See 49 FR 5305; 46 FR at 3643 (discussed infra).

Appellant has requested a hearing on the issues of this appeal. The Board has discretionary authority to order oral arguments on legal issues and an evidentiary hearing on factual issues. See 43 CFR 4.25, 4.415. A hearing before an Administrative Law Judge is necessary only where there is a material issue of fact requiring resolution through the introduction of testimony and other evidence. In the absence of such an issue, no hearing is required. Alumina Development of Utah, 77 IBLA 366 (1983). The record is sufficient for review and resolution of the issues before this Board. No novel legal issues which would merit oral argument have been presented and, hence, the request for oral argument is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen  
Administrative Judge

We concur:

Franklin D. Arness  
Administrative Judge

C. Randall Grant, Jr.  
Administrative Judge

